IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMERGENCY MOTION UNDER 9TH CIR. R. 27-3

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*,	)	
Plaintiffs/Appellees,	)	
v.	)	**No. 09-15266**
BARACK H. OBAMA, President of the United States, *et al.*,	)	
Defendants/Appellants.	)	

EMERGENCY MOTION FOR STAY PENDING APPEAL

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Al-Haramain Islamic Foundation, Inc. v. Obama
No. 09-15266

9th Cir. R. 27-3 Certificate

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II. Facts showing the existence and nature of the claimed emergency:

The district court has ruled that it can disclose classified information to plaintiffs' counsel over the objection of the responsible Executive Branch officials with exclusive authority to control access to the national security information in this case. This dispute concerns classified national security information that this Court has held to be protected from disclosure by the state secrets privilege. See Al-Haramain Islamic Foundation v. Bush, 507 F.3d 1190, 1201-1205 (9th Cir. 2006). On remand from that earlier appeal, the district court has now held that a federal statute, the Foreign Intelligence Surveillance Act (FISA) displaces the state secrets privilege and authorizes a federal court to disclose classified information to attorneys who do not meet the standards for access to classified information, as set forth in the governing Executive Orders. That holding is error, as the text of FISA makes no such provision.

The district court has ruled that plaintiffs' counsel here should have access to the classified information at issue, which is also subject to the state secrets privilege. The court has ordered the Government to process security clearances for plaintiffs' counsel, and has set a deadline of February 27 for the Government to indicate how it intends to comply with the court's order that plaintiffs' counsel should have access to classified information. Plaintiffs have urged the district court to override the Executive Branch official's determination that plaintiffs' counsel do not have a "need to know" the classified information, and have asked the court to provide them with access to that information before this Court has an opportunity to rule on the merits of the Government's pending appeal.

A stay is necessary to preserve the status quo and to protect this Court's authority to review the merits of the district court's plan to unilaterally disclose classified information, which is in turn based on that court's determination that FISA displaces the state secrets privilege. That holding, which we contend is legally incorrect, is the subject of the Government's pending appeal

III. Notification and service of counsel:

Lead counsel for plaintiffs Jon B. Eisenberg was informed by email and telephone call at approximately 12:00 noon Eastern time on Friday, February 20, 2009. All counsel for plaintiffs listed above were served on that date by email and by Federal Express for overnight delivery.

INTRODUCTION AND SUMMARY

The United States submits this emergency stay motion to foreclose the prospect of imminent disclosure of highly classified information that this Court has already held is protected from disclosure by the state secrets privilege. The district court has ruled that it will now adjudicate the very factual issue covered by the Government's privilege assertion, has ordered the Executive Branch to expeditiously process a security clearance for plaintiffs' attorneys in this case, and has made clear that it is doing so in order to disclose highly classified material to those attorneys, which the court believes is compelled by due process. Plaintiffs have explicitly urged the district court to disclose the classified information to their counsel, despite the determination by the Executive Branch that plaintiffs do not have the requisite "need to know" the information, and thus are not authorized to receive it.

Disclosure of the material at issue here would cause exceptionally grave harm to the national security and result in irreparable injury to the United States. Moreover, such disclosure by the district court of classified material over the objection of the Executive Branch would raise fundamental constitutional issues. A stay pending appeal is manifestly warranted so that this Court can undertake meaningful review of the district court's disclosure plans, which in turn are based on that court's mistaken conclusion that Congress sub silentio overrode the constitutionally based state secrets privilege through passage of the Foreign

Intelligence Surveillance Act ("FISA") (50 U.S.C. § 1801, et seq.). Accordingly, this Court should stay any proceedings by the district court that would result in disclosure of classified information.

Plaintiffs allege that they were subjected to warrantless electronic surveillance under the Terrorist Surveillance Program carried out by the National Security Agency. They claim that a highly classified sealed document that was inadvertently shown to them demonstrates that they had been unlawfully surveilled. In a 2007 decision, this Court held that the sealed document, and information regarding whether plaintiffs had indeed been subjected to surveillance, remain secret and highly classified, and were properly protected by the Government's assertion of the state secrets privilege. This Court remanded for the district court to consider plaintiffs' legal argument that Congress displaced the state secrets privilege in the electronic surveillance context by enacting FISA.

In July 2008, the district court held in an unprecedented decision that FISA did abrogate the state secrets privilege, even though nothing in the statute so indicates. The court subsequently applied that ruling here, ordering on January 5, 2009, that plaintiffs are entitled to pursue discovery into whether they had been subjected to surveillance. The court indicated that it would review the classified material in the record for the purpose of deciding whether the plaintiffs have been subject to the alleged surveillance, and concluded that due process forbids an ex parte proceeding.

Accordingly, the district court directed the Government to process security clearances for plaintiffs' counsel by February 13, 2009. The district court's order specifically contemplates that, once these private counsel have security clearances, they will be given access to highly classified information, despite the NSA Director's opposition.

The Government filed a notice of appeal and a stay motion in district court, and asked that court to enter a stay or interim stay no later than February 13, 2009, when the security clearance application process was ordered to be completed. On the afternoon of February 13, the district court denied the Government's stay request and confirmed its intention that "both parties have access to the material on which the court makes a decision." 2/19/09 Order at 2-3.

Under these circumstances, a stay pending appeal is necessary, prohibiting proceedings that will lead to disclosure of classified information by the district court. Such a stay will allow this matter to proceed in an orderly fashion, and prevent irreparable disclosure of sensitive, privileged information while the issues are litigated. The Government is prepared to pursue its appeal on an expedited schedule.

STATEMENT

A. The Terrorist Surveillance Program.

Following September 11, 2001, President Bush established the Terrorist Surveillance Program ("TSP"), authorizing the National Security Agency ("NSA") to intercept international communications into and out of the United States of persons

linked to al Qaeda or related terrorist organizations. NSA was authorized to intercept a communication under the TSP if one party to the communication was located outside the United States, and there was a reasonable basis to conclude that one party was a member of, or affiliated with, al Qaeda or a related organization. President Bush publicly acknowledged the TSP's existence in December 2005, but the program is no longer operative.

Details regarding how the TSP operated remain highly classified, and unauthorized disclosure of such information can be expected to cause exceptionally grave damage to national security. Thus, TSP-related information is classified at the Top Secret level and is subject to special access and handling procedures reserved for Sensitive Compartmented Information ("SCI") because it involves or derives from extraordinarily sensitive intelligence sources and methods.

B. Plaintiffs' Complaint And The District Court's 2006 Decision.

Plaintiffs – Al-Haramain Islamic Foundation, an Oregon corporation designated by the Treasury Department as a "Specially Designated Global Terrorist," and Wendell Belew and Asim Ghafoor, two attorneys affiliated with Al-Haramain – filed this action against the President, the NSA, and other federal agencies and officials. Plaintiffs alleged that they were subjected to warrantless electronic surveillance in violation of the First, Fourth, and Sixth Amendments, and FISA.

The Government formally asserted the state secrets privilege, and moved for

dismissal or summary judgment. Public and classified declarations of the Director of National Intelligence and the Director of NSA explained that the Government could neither confirm nor deny whether plaintiffs had been surveilled, and that litigation of plaintiffs' claims threatened disclosure of intelligence sources and methods, which would cause exceptionally grave harm to national security.

In September 2006, the district court found that the heads of the relevant departments had properly invoked the state secrets privilege. 451 F. Supp. 2d 1215, 1221. But that court nevertheless attempted to allow the case to proceed through in camera filings. Id. at 1229. The court based that ruling on the fact that plaintiffs had seen a classified document ("Sealed Document"), which, they claim, showed that they had been surveilled, and which had been inadvertently disclosed by a Treasury Department employee in a stack of material.[1/]

C. This Court's Reversal And Remand.

This Court reversed and remanded the district court's decision. 507 F.3d 1190. This Court held that the Government had properly invoked the state secrets privilege, and the Court sustained the privilege assertion as to operational details concerning the NSA program, including specifically whether plaintiffs had been subjected to

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[1/] On December 15, 2006, the Judicial Panel on Multidistrict Litigation transferred this case from the District of Oregon to the Northern District of California, where it is now part of the multidistrict litigation proceeding in In re NSA Telecomm. Records Litig., MDL No. 06-1791 (N.D. Cal.).

surveillance. 507 F.3d at 1201-05. In so doing, the Court concluded that the Government's state secrets assertion, which explained that divulging whether particular persons had or had not been subjected to surveillance would threaten grave harm to national security, was "exceptionally well documented," and demonstrated that disclosure would "compromise national security." Id. at 1203-04. This Court also agreed that the inadvertent disclosure of the (promptly retrieved) Sealed Document did not vitiate the state secrets privilege, and that the contents of that document remain privileged. Id. at 1204-05.

Having endorsed the Government's state secrets position, this Court concluded that dismissal of the case would be required unless FISA had displaced the state secrets privilege. Id. at 1205. The Court remanded for the district court to determine that issue in the first instance.

D. The District Court's Rulings On Remand, And The Government's Notice Of Appeal And Stay Motion.

1. Following remand, in July 2008, the district court dismissed plaintiffs' complaint, but gave them an opportunity to file an amended complaint that might demonstrate that they were "aggrieved persons" under FISA. The court permitted that step based on its view that FISA "preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes," 564 F. Supp. 2d 1109, 1111, and that Congress meant to "displace federal common law rules such as the state

secrets privilege with regard to matters within FISA's purview." Id. at 1120. Specifically, the court held that the statutory "in camera procedure described in FISA's section 1806(f) applies to preempt the [state secrets] protocol." Id. at 1119.

2. After plaintiffs filed an amended complaint, the Government again moved to dismiss, and plaintiffs sought discovery under section 1806(f). The district court on January 5, 2009, ruled that plaintiffs may establish a prima facie case based on unclassified, circumstantial allegations that might permit an inference that they had been subjected to electronic surveillance. 1/5/09 Order at 13. The court found the amended complaint sufficient to allege plaintiffs' status as aggrieved persons, and concluded that section 1806(f) therefore provides a means for allowing plaintiffs discovery. The court stated that it will review the Sealed Document that was the subject of the state secrets privilege claim, and will "issue an order regarding whether plaintiffs may proceed – that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA." Id. at 23. That order, as well as other future orders, may be issued under seal to "avoid indirectly disclosing some aspect of the Sealed Document's contents." Ibid.

However, the court concluded that proceeding ex parte would deprive plaintiffs of due process, and therefore "provide[d] for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders." 1/5/09 Order

at 23. The court directed that plaintiffs' counsel must be allowed "to apply for TS/SCI clearance and [the Government] shall expedite the processing of such clearances so as to complete them no later than Friday, February 13, 2009." Id. at 24.

3. The Government quickly filed a notice of appeal and sought a stay pending appeal; out of an abundance of caution, we also requested certification under 28 U.S.C. § 1292(b). With the stay motion, the Government filed a declaration of NSA's Associate General Counsel advising that "subsequent to the [district court's] January 5, 2009, Order, the NSA Director has reviewed the matter and has determined that plaintiffs' counsel do not have the requisite 'need to know' and therefore should not receive access to the NSA information at issue in this case." Cerlenko Decl. ¶2 .[2/]

On February 13, the district court denied the requested stay, and denied the section 1292(b) petition. In the order denying the stay, the court confirmed its intention to disclose classified information to plaintiffs' counsel. See 2/13/09 Order at 2 ("the January 5 order provided for plaintiffs' counsel to obtain top secret/sensitive compartmented information security clearances"); ibid. (quoting transcript of January 23 hearing concerning intent to "proceed in a judicial fashion; and by that I mean a fashion in which both parties have access to the material upon

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[2/] As directed by the district court, the Government is undertaking a review of the classified status of information at issue in this case. That review is expected to confirm that the key information remains classified.

which the court makes a decision").

The order denying the stay also indicated that the district court does not intend to proceed before February 27, 2009, the deadline for the Government to indicate how it intends to comply with the Court's Order that plaintiffs' counsel be given access to the classified information at issue. See id. at 3. That, however, is the central issue on appeal. Plaintiffs – following the district court's denial of a stay – have urged the district court to disclose to their attorneys the information at issue here, which remains classified and subject to the state secrets privilege. Plaintiffs contend that the Government relinquished its control over further disclosure of classified information when it submitted a filing to an Article III court for the purpose of asserting and explaining the state secrets privilege. That argument is incorrect, and should be addressed by this Court before any disclosure takes place. A stay is necessary to ensure that no irreparable harm resulting from disclosure results before this Court has an opportunity to address these fundamental issues concerning the separation of powers and the protection of national security.

ARGUMENT

"In deciding whether to issue a stay pending appeal, th[is] [C]ourt considers (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the

proceeding; and (4) where the public interest lies." Humane Society v. Gutierrez, 527 F.3d 788, 789-90 (9th Cir. 2008) (internal quotation marks omitted). The Court weighs these factors along a "single continuum": at one end of the spectrum, the moving party is required to demonstrate probable success on the merits and the possibility of irreparable harm; at the other end, the party is required to show that serious questions have been raised and the balance of hardships tips sharply in the moving party's favor. Artukovic v. Rison, 784 F.2d 1354, 1355 (9th Cir. 1986). These standards are amply satisfied here. The prospect of imminent disclosure of highly classified, privileged information threatens exceptionally grave harm to the national security, and irreparable injury to the United States, whereas a pause in further trial court proceedings while this Court considers the important issues raised by the district court's January 5 order would not cause any harm to plaintiffs. Moreover, the district court's ruling is unprecedented and raises serious legal questions, and the balance of hardships militates strongly in the Government's favor.

I. BALANCE OF HARMS AND THE PUBLIC INTEREST.

The United States faces a clear threat of irreparable harm in the absence of a stay. The district court has ruled that it will now determine whether plaintiffs have been subject to alleged surveillance and, for that purpose, has directed the Executive Branch to expedite security clearances for three of plaintiffs' attorneys. The court's order threatens to disclose classified national security information over the objection

of the Executive and in the face of a determination by the responsible agency that plaintiffs' attorneys do not have a need to know the classified information. Moreover, the classified information at issue is subject to the state secrets privilege, which this Court has upheld in an earlier appeal. See 507 F.3d at 1201-05.

This Court has repeatedly recognized that a district court's order requiring the disclosure of privileged material is often "irreparable by any subsequent appeal," In re Napster, Inc. Copyright Litigation, 479 F.3d 1078, 1088 (9th Cir. 2007), and that clearly is the case here. Indeed, the Supreme Court and other courts have repeatedly recognized that disclosure of classified information over the objection of the Executive constitutes irreparable injury to national security. See, e.g., Snepp v. United States, 444 U.S. 507, 513 (1980). The grant of a security clearance and the authority to determine who or how many persons shall have access to classified information, "is committed by law to the appropriate agency of the Executive Branch," and "flows primarily from [a] constitutional investment of power in the President." Department of the Navy v. Egan, 484 U.S. 518, 526-27 (1988). The district court's usurpation of that power threatens the Executive's authority and responsibility to protect national security information from unauthorized disclosure.

Where a district court has ordered or threatened the disclosure of otherwise protected information, a stay pending appeal is necessary to protect both the information and the authority of the appellate court to exercise meaningful review.

See, e.g., Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored").

Here, the district court has held that FISA permits the court to disclose classified information to plaintiffs' attorneys, and plaintiffs continue to urge such disclosure prior to this Court's review. The court plans to rule on "whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA." 1/5/09 Order at 23. And the court recently re-emphasized its view that "both parties [should] have access to the material upon which the court makes a decision." 2/13/09 Order at 3. Any such determination by the court would reveal classified, privileged information. As this Court recognized, "the Sealed Document is protected by the state secrets privilege, along with the information as to whether the government surveilled Al-Haramain." 507 F.3d at 1203; see also ibid. ("the basis for the privilege is exceptionally well documented").

The district court has suggested that orders addressing classified information might be issued under seal, but the very process set by that court for determining whether plaintiffs have been subject to alleged surveillance, and thus whether they have standing, would inherently risk or require the disclosure of privileged information in further proceedings. And the court has also made clear that it intends to reveal any order concerning standing (and other, unspecified classified

information) to plaintiffs' counsel. See 1/5/09 Order at 23 ("this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders"; "counsel for plaintiffs [must be] granted access to the court's rulings and, possibly, to at least some of defendants' classified filings"); 2/13/09 Order at 2-3 (indicating intention that "both parties have access to the material upon which the court makes a decision"). Even a bare conclusion of whether or not plaintiffs were subjected to surveillance, in the context of a determination of whether plaintiffs have standing, would risk disclosure of classified and privileged information, and would cause exceptionally grave harm to the national security.

Moreover, revealing any such information to plaintiffs' counsel (let alone to the public) would not only contravene the state secrets privilege upheld by this Court, but also the governing executive order, which establishes that, before classified information can be disclosed to an individual, three independent conditions must be satisfied: First, the relevant Executive agency must determine that the recipient is trustworthy. Second, the recipient must sign an approved non-disclosure agreement. And, third, the recipient must have a "need to know" the classified information. See Exec. Order 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended by Exec. Order 13292, 68 Fed. Reg. 15315, 15324 (Mar. 25, 2003). The need-to-know standard is satisfied only if the responsible Executive Branch agency determines that the

"prospective recipient requires access to specific classified information to perform or assist in a lawful and authorized governmental function." 68 Fed. Reg. 15322.

Here, the responsible Executive Branch official – the NSA Director – has determined that plaintiffs' counsel do not have a need to know the classified information at issue. See Cerlenko Decl. ¶ 9. Indeed, "disclosure of this information would cause exceptional harm to national security." Ibid. A district court decision overriding that determination would infringe upon the Executive's exclusive authority to control access to the national security information in this case. The risk of such disclosure is imminent: the Court has ordered the Government to state, by February 27, 2009, how it will comply with the court's access order.

On the other side of the scale, the effect of a stay on plaintiffs and the district court will be negligible. Plaintiffs would suffer no harm from a stay. The only effect would be to delay the district court proceedings while this Court considers the Government's appeal. Cf. Providence Journal, 595 F.2d at 890 ("the granting of a stay will be detrimental to the Journal (and to the public's interest in disclosure) only to the extent that it postpones the moment of disclosure assuming the Journal prevails by whatever period of time may be required for us to hear and decide the appeals"). Especially in light of the unprecedented nature of the district court's underlying ruling that FISA displaces the state secrets privilege, such a delay would be unexceptional. And any delay would potentially be quite short, as the Government

is amenable to an expedited briefing and argument schedule. The public interest would similarly be served by a stay pending appeal, which would safeguard national security information from improper disclosure until this Court has an opportunity to review the novel questions raised by the district court's rulings.

II. LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The district court's January 5 order threatening disclosure of classified information to plaintiffs' counsel is premised on the court's unprecedented conclusion that FISA implicitly abrogates the state secrets privilege, which is grounded in the Executive's constitutional responsibility to protect the national security. See El-Masri v. United States, 479 F.3d 296, 303-04 (4th Cir. 2007) (citing United States v. Nixon, 418 U.S. 683, 710 (1974)). That ruling is wrong on the merits. Serious constitutional questions would arise if FISA were read to displace the privilege, impairing the President's ability to protect military and intelligence secrets from improper disclosure. And the courts will not read a statute to attempt to interfere with the President's constitutional authority unless Congress has made clear in the statutory text its intent to do so. See Armstrong v. Bush, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear."). Moreover, the constitutional avoidance doctrine requires that a statute be construed to avoid such difficulties "unless such construction is plainly contrary to the intent

of Congress." See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Council, 485 U.S. 568, 575 (1988).

The state secrets privilege also has deep common-law roots, Kasza v. Browner, 133 F.3d 1159, 1167 (9th Cir. 1998), and thus "'ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35 (1983); Kasza, 133 F.3d 1167-68. Thus, even apart from of its constitutional dimensions, the privilege could not be deemed overriden without, at a minimum, a "clear and explicit" expression of such a Congressional intent.

Nothing in FISA comes even close to explicitly overriding the state secrets privilege. Far from reflecting the requisite clear intent to do so, section 1806(f) simply provides aggrieved persons with a shield against the Government's affirmative use of information obtained from disclosed electronic surveillance. Located within FISA's provision governing the Government's "[u]se of information" obtained from surveillance (50 U.S.C. § 1806), subsection (f) applies only to three situations in which the potential use of surveillance-based information in legal proceedings against an aggrieved person requires a judicial determination of whether the underlying surveillance was lawful. See 50 U.S.C. § 1806(f)(1), (2), (3). Accordingly, the text of section 1806(f) itself makes clear that its procedure for an in camera, ex parte judicial determination of the legality of relevant surveillance applies only when the

Attorney General himself invokes that procedure to facilitate governmental use of information derived from such surveillance in legal proceedings.

Through FISA, Congress intended to strike a careful "balance" between an aggrieved person's "ability to defend himself" against the Government's invocation of the legal process, and the need to protect "sensitive foreign intelligence information." S. Rep. No. 95-701, at 64 (1978). Congress explained that "notice [of surveillance] to the surveillance target" – and the subsequent use of in camera procedures to test the legality of disclosed surveillance – would be inappropriate "unless the fruits are to be used against him in legal proceedings." Id. at 11-12 (emphasis added). And, even if a court orders disclosure under section 1806(f), Congress gave the Government a choice: "either disclose the material or forgo the use of the surveillance-based evidence." Id. at 65. That choice exists only when the Government uses such evidence as a sword. The district court's holding here that FISA provides a vehicle for persons to discover whether they have been subjected to NSA surveillance, based on their own allegations of surveillance – notwithstanding the state secrets privilege and the Executive's constitutional authority to control access to classified information – is without basis in FISA's text and history.

B. The district court's plan to disclose classified and privileged national security information is also contrary to controlling legal authority. As discussed already, control over the dissemination of classified information is constitutionally

committed to the Executive. And a determination of trustworthiness or access eligibility (the first step in the security clearance process) does not entitle anyone to actually receive particular classified information.

The authority "to classify and control access to information bearing on national security" is constitutionally vested in the President as head of the Executive Branch and as Commander in Chief. See Egan, 484 U.S. at 526-27 (1988); see also, e.g., Brazil v. Dept. of Navy, 66 F.3d 193, 196 (9th Cir. 1995) ("security clearance determinations are 'sensitive and inherently discretionary' exercises, entrusted by law to the Executive" (quoting Egan); "The decision to grant or revoke a security clearance is committed to the discretion of the President by law.").

Under the governing executive order, federal agencies must "ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs." 68 Fed. Reg 15330. Consistent with this directive, agencies may not authorize access to classified information unless the responsible Executive Branch official finds a need to know the information. Such a determination depends on a finding that the "prospective recipient requires access to specific classified information to perform or assist in a lawful and authorized governmental function." 68 Fed. Reg. 15332.

The district court has rejected both the premise of Executive control and the applicable procedures under the governing executive orders. 1/5/09 Order at 21. The

court directed the Government to "expedite the processing of [security] clearances" for three of plaintiffs' counsel. Id. at 24; 2/13/09 Order at 2 ("the January 5 order provided for plaintiffs' counsel to obtain top secret/sensitive compartmented information security clearances"). And the court concluded that it can itself provide access to classified information, notwithstanding the Executive's determination that there is no need to know. See 1/5/09 Order at 23 ("this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders"); 2/13/09 Order at 2-3 ("both parties [will] have access to the material upon which the court makes a decision"). Those steps misapprehend the constitutional allocation of authority to control classified information.

Because the information at issue here is subject to the state secrets privilege, the district court's determination is doubly mistaken. Even counsel with a security clearance are not entitled to access privileged state and military secrets. See Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 401-02 (D.C. Cir. 1984). Thus, even apart from the district court's disregard of Executive control, the court committed legal error in concluding that it can direct that privileged information be revealed to plaintiffs' counsel on the basis of a security clearance trustworthiness determination. As Northrop explained, "[t]he trustworthiness of the litigants * * * is not always dispositive in cases such as this." 751 F.2d at 401. Harm to national

security cannot be avoided merely by limiting "disclosure * * * to participants with adequate security clearances." Ibid.; see also id. at 402 ("Regardless of the availability of protective orders or 'need-to-know' mechanisms, we believe that the district court acted within reason when it decided that this disclosure would present a danger of harm to foreign relations and national security.").[3/]

CONCLUSION

This Court should stay pending appeal any district court proceedings that will lead to disclosure of classified information.

[3/] Plaintiffs argued below that this Court lacks jurisdiction to hear the Government's appeal. That argument is incorrect and in any event provides no basis to deny a stay, which would preserve the status quo and this Court's authority to determine its own jurisdiction. The district court has ruled that the Executive's power to invoke the state secrets privilege is preempted by FISA, and that due process requires disclosure of privileged information to plaintiffs' counsel. Those rulings warrant a stay on their own terms, and any questions regarding appellate jurisdiction can be aired in the parties' merits briefing. Multiple grounds for appellate jurisdiction exist here: The collateral-order doctrine generally applies where privileged information is ordered disclosed and the privilege is sufficiently important. See In re Napster, 479 F.3d at 1088-89. An order is also appealable where it has the practical effect of granting an injunction, has serious or irreparable consequences, and can be effectively challenged only by immediate appeal. Negrete v. Allianz Life Ins. Co., 523 F.3d 1091, 1097 (9th Cir. 2008); Orange County Airport Hotel Assocs. v. HSBC Ltd., 52 F.3d 821, 825-26 (9th Cir. 1995). In the extraordinary circumstances presented by this case, mandamus jurisdiction would also be appropriate. See United States v. Austin, 416 F.3d 1016, 1024 (9th Cir. 2005). The Government in its briefing intends to invoke all three jurisdictional bases for appeal.

Respectfully submitted,

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FEBRUARY 2009

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2009, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:

NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION

MDL Docket No 06-1791 VRW

ORDER

This order pertains to:

Al-Haramain Islamic Foundation et al v Bush et al (C-07-0109 VRW),

/

The United States has sought to appeal as of right, pursuant to 29 USC § 1291 and also seeks an order certifying the court's January 5, 2009 order for an interlocutory appeal pursuant to 28 USC § 1292(b) and staying proceedings in this court pending the outcome of such an appeal. Doc # 545/60. The stated purpose of such a stay is "to ensure that no disclosures [of classified material] occur in the meantime." Doc #560/70 at 6.

The United States noticed these motions for April 9, 2009, but at a January 23, 2009 case management conference herein, the court established a shortened briefing schedule and vacated the April 9 hearing date pending further orders of the court. Under the schedule established by the court, the United States' reply brief was due on February 13. Instead, the United States filed its

reply brief on February 11 and included therein the following:

> The Government respectfully requests that the Court indicate how it will proceed by 3 pm on February 13, 2009. In order to protect its interests, the Government plans to seek relief from the Ninth Circuit before the close of business that day in the absence of relief from this Court.

Doc #560/70 at 6-7.

First, the January 5 order is not a "final decision" and, therefore, not appealable pursuant to 28 USC § 1291. Second, the court is fully aware of its obligations with regard to classified information. The court's January 5 order stated that it would prioritize two interests: "protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action." Doc #537/57 at 23. The court then entered orders designed to make it possible for the court to determine whether plaintiffs had been subject to unlawful electronic surveillance and, crucially, to enter an order under seal regarding the outcome of that determination. To that end, the January 5 order provided for plaintiffs' counsel to obtain top secret/sensitive compartmented information security clearances.

The court understands that the background investigation of two of plaintiffs' counsel have been completed and "favorably adjudicated" although clearances for these individuals have not been issued. At the January 23 hearing herein, the court stated:

> I have no intention of reviewing the sealed document [containing classified information] until we get all of these pieces in place so that we can proceed in a judicial fashion; and by that I mean a fashion in which both parties have access to the material upon which the court makes a decision.

RT (Doc #532) at 34.

The court seeks from the government implementation of the steps necessary to afford that "both parties have access to the material upon which the court makes a decision." That is the procedure the January 5 order seeks to put in place. That order is, therefore, entirely interlocutory and an "immediate appeal will not materially advance ultimate termination of the litigation." An appeal under 28 USC § 1292(b) and stay are not appropriate and are, therefore, DENIED.

The government is DIRECTED not later than February 27, 2009 to inform the court how it intends to comply with the January 5 order.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE:

NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION

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This order pertains to:

Al-Haramain Islamic Foundation et al v Bush et al (C 07-0109 VRW),

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MDL Docket No 06-1791 VRW

ORDER

On November 16, 2007, the court of appeals remanded this case for this court to consider whether the Foreign Intelligence Surveillance Act, 50 USC §§ 1801-71, ("FISA") "preempts the state secrets privilege and for any proceedings collateral to that determination." Al-Haramain Islamic Foundation, Inc v Bush, 507 F3d 1190, 1206 (9th Cir 2007). This court entertained briefing and held a hearing on that issue and, on July 2, 2008, issued a ruling that: (1) FISA preempts the state secrets privilege in connection with electronic surveillance for intelligence purposes and would appear to displace the state secrets privilege for purposes of plaintiffs' claims; and (2) FISA did not appear to provide plaintiffs with a viable remedy unless they could show that they were "aggrieved persons" within the meaning of FISA. In re

National Security Agency Telecommunications Records Litigation, 564 F Supp 2d 1109, 1111 (N D Cal 2008). The court dismissed the complaint with leave to amend. Plaintiffs timely filed an amended pleading (Doc #458/35[1]) and defendants, for the third time, moved to dismiss (Doc #475/49). Plaintiffs simultaneously filed a motion to "discover or obtain material relating to electronic surveillance" under 50 USC § 1806(f) (Doc #472/46), which defendants oppose (Doc #496/50).

This pair of cross-motions picks up, at least in theory, where the court's July 2, 2008 order left off. At issue on these cross-motions is the adequacy of the first amended complaint (Doc #35/458)("FAC") to enable plaintiffs to proceed with their suit. Accordingly, the court's discussion will address the motions together.[2]

I

As with the original complaint, plaintiffs are the Al-Haramain Islamic Foundation, Inc, an Oregon non-profit corporation ("Al-Haramain Oregon"), and two of its individual attorneys, Wendell Belew and Asim Ghafoor, both United States citizens ("plaintiffs"). Plaintiffs sue generally the same defendants but replace one office-holder with his replacement, make minor punctuation and wording changes and specify that they are suing one

[1] Documents will cited both to the MDL docket number (No M 06-1791) and to the individual docket number (No C 07-0109) in the following format: Doc #xxx/yy.

[2] These motions do not implicate the recent amendments to FISA enacted after the July 2 order (FISA Amendments Act of 2008, Pub L No 110-261, 122 Stat 2436 (FISAAA), enacted July 10, 2008).

defendant in both his official and personal capacities: "George W Bush, President of the United States, National Security Agency and Keith B Alexander, its Director; Office of Foreign Assets Control, an office of the United States Treasury, and Adam J Szubin, its Director; Federal Bureau of Investigation and Robert S Mueller, III, its Director, in his official and personal capacities" ("defendants").

The FAC retains the same six causes of action as the original complaint. First, plaintiffs allege a cause of action under FISA that encompasses both a request, under 50 USC § 1806(g), for suppression of evidence obtained through warrantless electronic surveillance and a claim for damages under § 1810. Doc #458/35 at 14. Then, plaintiffs allege violations of the following Constitutional provisions: the "separation of powers" principle (i e, that the executive branch has exceeded its authority under Article II); the Fourth Amendment through warrantless surveillance of plaintiffs' electronic communications; the First Amendment through warrantless surveillance, impairing plaintiffs' "ability to obtain legal advice, to freely form attorney-client relationships, and to petition the government * * * for redress of grievances * * *"; and the Sixth Amendment through surveillance of plaintiffs' electronic communications without probable cause or warrants. Id at 14-15. And finally, plaintiffs allege violations of the International Covenant on Civil and Political Rights. Id at 15-16.

In drafting the FAC, plaintiffs have greatly expanded their factual recitation, which now runs to ten pages (id at 3-12), up from a little over one page. The FAC recites in considerable detail a number of public pronouncements of government officials

about the Terrorist Surveillance Project ("TSP") and its surveillance activities as well as events publicly known about the TSP including a much-publicized hospital room confrontation between former Attorney General John Ashcroft and then-White House counsel (later Attorney General) Alberto Gonzales (id at 5).

Of more specific relevance to plaintiffs' effort to allege sufficient facts to establish their "aggrieved person" status, the FAC also recites a sequence of events pertaining directly to the government's investigations of Al-Haramain Oregon. A slightly abbreviated version of these allegations follows:

On August 1, 2002, Treasury Department Deputy Secretary Kenneth W Dam testified in Congress that, in October of 2001, the Treasury Department created "Operation Green Quest" to track financing of terrorist activities, one of the targets of which were foreign branches of the Saudi Arabia-based Al-Haramain Islamic Foundation. ¶ 24.

On March 4, 2004, FBI Counterterrorism Division Acting Assistant Director Gary M Bald testified in Congress that: in April of 2002, the FBI created its Terrorist Financing Operations Section (TFOS); on May 13, 2003, through a Memorandum of Understanding between the Department of Justice and the Department of Homeland Security, the FBI was designated as the lead Department to investigate potential terrorist-related financial transactions; the TFOS acquired, analyzed and disseminated classified electronic intelligence data, including telecommunications data from sources in government and private industry; TFOS took over the investigation of Al-Haramain Islamic Foundation "pertaining to terrorist financing"; on February 18, 2004, the FBI executed a

search warrant on plaintiff Al-Haramain Oregon's office in Ashland, Oregon; and TFOS provided operational support, including document and data analysis, in the investigation of plaintiff Al-Haramain Oregon. ¶ 25. Bald's March 4, 2004 testimony included no mention of purported links between plaintiff Al-Haramain Oregon and Osama bin-Laden. ¶ 26.

On September 25, 2003, FBI Deputy Director John S Pistole testified in Congress that the TFOS "has access to data and information" from "the Intelligence Community" and has "[t]he ability to access and obtain this type of information in a time sensitive and urgent manner." ¶ 27.

On June 16, 2004, OFAC Director R Richard Newcomb testified in Congress that in conducting investigations of terrorist financing, OFAC officers use "classified * * * information sources." ¶ 28.

On July 26, 2007, defendant Mueller testified before the House Judiciary Committee that in 2004 the FBI, under his direction, undertook activity using information produced by the NSA through the warrantless surveillance program.

On February 19, 2004, the Treasury Department issued a press release announcing that OFAC had blocked Al-Haramain Oregon's assets pending an investigation of possible crimes relating to currency reporting and tax laws; the document contained no mention of purported links between plaintiff Al-Haramain Oregon and Osama bin-Laden. ¶¶ 30-31.

Soon after the blocking of plaintiff Al-Haramain Oregon's assets on February 19, 2004, plaintiff Belew spoke by telephone with Soliman al-Buthi (alleged to be one of Al-Haramain Oregon's

directors) on the following dates: March 10, 11 and 25, April 16, May 13, 22 and 26, and June 1, 2 and 10, 2004. Belew was located in Washington DC; al-Buthi was located in Riyadh, Saudi Arabia. During the same period, plaintiff Ghafoor spoke by telephone with al-Buthi approximately daily from February 19 through February 29, 2004 and approximately weekly thereafter. Ghafoor was located in Washington DC; al-Buthi was located in Riyadh, Saudi Arabia. (The FAC includes the telephone numbers used in the telephone calls referred to in this paragraph.) ¶¶ 34-35.

In the telephone conversations between Belew and al-Buthi, the parties discussed issues relating to the legal representation of defendants, including Al-Haramain Oregon, named in a lawsuit brought by victims of the September 11, 2001 attacks. Names al-Buthi mentioned in the telephone conversations with Ghafoor included Mohammad Jamal Khalifa, who was married to one of Osama bin-Laden's sisters, and Safar al-Hawali and Salman al-Auda, clerics whom Osama bin-Laden claimed had inspired him. In the telephone conversations between Ghafoor and al-Buthi, the parties also discussed logistical issues relating to payment of Ghafoor's legal fees as defense counsel in the lawsuit. Id.

In a letter to Al-Haramain Oregon's lawyer Lynne Bernabei dated April 23, 2004, OFAC Director Newcomb stated that OFAC was considering designating Al-Haramain Oregon as a Specially Designated Global Terrorist (SDGT) organization based on unclassified information "and on classified documents that are not authorized for public disclosure." ¶ 36. In a follow-up letter to Bernabei dated July 23, 2004, Newcomb reiterated that OFAC was considering "classified information not being provided to you" in

determining whether to designate Al-Haramain Oregon as an SDGT organization. ¶ 37. On September 9, 2004, OFAC declared plaintiff Al-Haramain Oregon to be an SDGT organization. ¶ 38.

In a press release issued on September 9, 2004, the Treasury Department stated that the investigation of Al-Haramain Oregon showed "direct links between the US branch [of Al-Haramain] and Usama bin Laden"; this was the first public claim of purported links between Al-Haramain Oregon and Osama bin-Laden. ¶¶ 39-40.

In a public declaration filed in this litigation dated May 10, 2006, FBI Special Agent Frances R Hourihan stated that a classified document "was related to the terrorist designation" of Al-Haramain Oregon.

On October 22, 2007, in a speech at a conference of the American Bankers Association and American Bar Association on money laundering, the text of which appears on the FBI's official Internet website, FBI Deputy Director Pistole stated that the FBI "used * * * surveillance" in connection with defendant OFAC's 2004 investigation of Al-Haramain Oregon but that "it was the financial evidence" provided by financial institutions "that provided justification for the initial designation" of Al-Haramain Oregon. ¶¶ 42-43. A court document filed by the United States Attorney for the District of Oregon on August 21, 2007 referred to the February 19, 2004 asset-blocking order as a "preliminary designation" and the September 9, 2004 order as "a formal designation." ¶ 44.

To allege that the above-referenced telecommunications between al-Buthi and plaintiffs Belew and Ghafoor were wire communications and were intercepted by defendants within the United States, plaintiffs cite in their FAC several public statements by

government officials, including: July 26, 2006 testimony by defendant Alexander and CIA Director Michael Hayden that telecommunications between the United States and abroad pass through routing stations located within the United States from which the NSA intercepts such telecommunications; May 1, 2007 testimony by Director of National Intelligence Mike McConnell that interception of surveilled electronic communications between the United States and abroad occurs within the United States and thus requires a warrant under FISA; September 20, 2007 testimony by McConnell testified before the House Select Intelligence Committee that "[t]oday * * * [m]ost international communications are on a wire, fiber optical cable," and "on a wire, in the United States, equals a warrant requirement [under FISA] even if it was against a foreign person located overseas." ¶ 48a-c.

A memorandum dated February 6, 2008, to defendant Szubin from Treasury Department Office of Intelligence and Analysis Deputy Assistant Secretary Howard Mendelsohn, which was publicly disclosed during a 2005 trial, acknowledged electronic surveillance of four of Al-Buthi's telephone calls with an individual unrelated to this case on February 1, 2003. ¶ 51.

In support of their motion under § 1806(f), plaintiffs submit evidence substantiating the allegations of their FAC. In addition to numerous documents drawn from United States government websites and the websites of news organizations (Exhibits to Doc #472-1/46-1, passim), plaintiffs submit the sworn declarations of plaintiffs Wendell Belew and Asim Ghafoor attesting to the specifics and contents of the telephone conversations described in paragraphs 32 and 33 of the FAC. Doc ##472-6/46-6, 472-7/46-7.

II

Defendants' papers attack the sufficiency of plaintiffs' allegations in their FAC and the evidence presented in their motion under § 1806(f) to establish that they are "aggrieved persons" under FISA and thereby have standing to utilize the special procedures set forth in § 1806(f) of FISA to investigate the alleged warrantless surveillance and to seek civil remedies under § 1810. An "aggrieved person" under FISA is defined in 50 USC §1801(k) as the "target of an electronic surveillance" or a person "whose communications or activities were subject to electronic surveillance." Defendants contend that "nothing in the [FAC] comes close to establishing that plaintiffs are 'aggrieved persons' under FISA and thus have standing to proceed under Section 1806(f) to litigate any claim." Doc #475/49 at 6.

Plaintiffs' motion, by contrast, asserts that the FAC presents "abundant unclassified information demonstrating plaintiffs' electronic surveillance in March and April of 2004" and, on that basis, seeks a determination of "aggrieved person" status under FISA. Plaintiffs also "propose several possible security measures by which plaintiffs can safely be given access to portions of" the classified document that was accidentally revealed to plaintiffs during discovery and returned under orders of the Oregon District Court (the "Sealed Document") and which has been the subject of considerable attention in this litigation. Doc #472/46 at 5-6.

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A

Both FISA sections under which plaintiffs seek to proceed, §§ 1810 and 1806(f), are available only to "aggrieved persons" as defined in 50 USC § 1801(k). The court's July 2 order discussed the lack of precedents under FISA and devoted considerable space to opinions applying 18 USC § 3504(a)(1), governing litigation concerning sources of evidence. 564 F Supp 2d at 1133-35. The Ninth Circuit's standards under § 3504(a)(1), while not directly transferrable to FISA, appear to afford a source of relevant analysis to use by analogy in interpreting FISA, subject to that statute's national-security-oriented context:

> The flexible or case-specific standards articulated by the Ninth Circuit for establishing aggrieved status under section 3504(a)(1), while certainly relevant, do not appear directly transferrable to the standing inquiry for an "aggrieved person" under FISA. While attempting a precise definition of such a standard is beyond the scope of this order, it is certain that plaintiffs' showing thus far with the Sealed Document excluded falls short of the mark.
>
> Plaintiff amici hint at the proper showing when they refer to "independent evidence disclosing that plaintiffs have been surveilled" and a "rich lode of disclosure to support their claims" in various of the MDL cases. ***
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> To proceed with their FISA claim, plaintiffs must present to the court enough specifics based on non-classified evidence to establish their "aggrieved person" status under FISA.

Id at 1135.

Defendants' opening brief (Doc #475/49) largely fails to engage with the question posed by the court, instead reiterating standing arguments made previously (at 16-17) and asserting that "the law does not support an attempt to adjudicate whether the plaintiffs are 'aggrieved persons' in the face of the Government's successful state secrets privilege assertion" (at 27-30).

Defendants advance one apparently new argument in this regard: that the adjudication of "aggrieved person" status for any or all plaintiffs cannot be accomplished without revealing information protected by the state secrets privilege ("SSP"). This argument rests on the unsupported assertion that "[t]he Court cannot exercise jurisdiction based on anything less than the actual facts" (id at 28), presumably in contrast to <u>inferences</u> from other facts (on which defendants contend the FAC exclusively relies). Defendants' position boils down to this: only affirmative confirmation by the government or equally probative evidence will meet the "aggrieved person" test; the government is not required to confirm surveillance and the information is not otherwise available without invading the SSP. In defendants' view, therefore, plaintiffs simply cannot proceed on their claim without the government's active cooperation —— and the government has evinced no intention of cooperating here.

Defendants' stance does not acknowledge the court's ruling in the July 2, 2008 order that FISA "preempts" or displaces the SSP for matters within its purview and that, while obstacles abound, canons of construction require that the court avoid interpreting and applying FISA in a way that renders FISA's § 1810 superfluous. Accordingly, the court ruled, there must be some legally sufficient way to allege that one is an "aggrieved person" under § 1801(k) so as to survive a motion to dismiss. Of note, defendants also continue to maintain, notwithstanding the July 2 rulings, that the SSP requires dismissal and that FISA does not preempt the SSP. They also suggest that appellate review of the preemption ruling and several of the issues implicated in the

instant motions might be "appropriate" if the court decides to proceed under § 1806(f). Doc #475/49 at 31. (Plaintiffs counter that an interlocutory appeal of the preemption question would not be timely. Doc #496/50 at 28).

Plaintiffs urge the court to adopt the Ninth Circuit's prima facie approach under 18 USC § 3504(a)(1) set forth in United States v Alter, 482 F2d 1016 (9th Cir 1973), that is, that a prima facie case of electronic surveillance requires "evidence specifically connecting them with the surveillance —— i e showing that they were surveilled" without requiring that they "plead and prove [their] entire case." Plaintiffs further suggest that the prima facie case does not require the determination of any contested facts but rather is "a one-sided affair —— the plaintiff's side." Doc #472/46 at 20.

Plaintiffs also point to the DC Circuit's recent decision in In Re Sealed Case, 494 F 3d 139 (DC Cir 2007), which reversed the district court's dismissal of a Bivens action by a Drug Enforcement Agency employee based on the government's assertion of the SSP. The district court had concluded that the plaintiff's unclassified allegations of electronic eavesdropping in violation of the Fourth Amendment were insufficient to establish a prima facie case. Id at 147. The DC Circuit upheld the dismissal as to a defendant called "Defendant II" of whom the court wrote "nothing about this person would be admissible in evidence at trial," but reversed the dismissal as to defendant Huddle, noting that although plaintiff's case "is premised on circumstantial evidence 'as in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence.'" Id. Plaintiffs accordingly argue that

circumstantial evidence of electronic surveillance should be sufficient to establish a prima facie case. The court agrees with plaintiffs that this approach comports with the intent of Congress in enacting FISA as well as concepts of due process which are especially challenging —— but nonetheless especially important —— to uphold in cases with national security implications and classified evidence.

Plaintiffs articulate their proposed standard, in summary, as follows: "plaintiffs' burden of proving their 'aggrieved person' status is to produce unclassified prima facie evidence, direct and/or circumstantial, sufficient to raise a reasonable inference on a preponderance of the evidence that they were subjected to electronic surveillance." Doc #472/46 at 19.

Defendants attack plaintiffs' proposed prima facie case approach by suggesting, as to plaintiffs' motion, that "no court has ever used Section 1806(f) in this manner" and that it would "open a floodgate of litigation whereby anyone who believes he can 'infer' from 'circumstantial evidence' that he was subject to electronic surveillance could compel a response by the Attorney General under Section 1806(f) and seek discovery of the matter through ex parte, in camera proceedings." Doc # 499/51 at 12-13. These points are without merit.

The lack of precedents for plaintiffs' proposed approach is not meaningful given the low volume of FISA litigation in the thirty years since FISA was first enacted. It is, moreover, unlikely that this court's order allowing plaintiffs to proceed will prompt a "flood" of litigants to initiate FISA litigation as a means of learning about suspected unlawful surveillance of them by

the government. And finally, the court has ruled that allegations sufficient to allege electronic surveillance under FISA must be, to some degree, particularized and specific, a ruling that discourages weakly-supported claims of electronic surveillance. In re National Security Agency, 564 F Supp 2d at 1135.

In Alter, the Ninth Circuit specifically noted the competing considerations and special challenges for courts in cases of alleged electronic surveillance:

> We * * * seek to create a sound balance among the competing demands of constitutional safeguards protecting the witness and the need for orderly grand jury processing. We do not overlook the intrinsic difficulty in identifying the owner of an invisible ear; nor do we discount the need to protect the Government from unwarranted burdens in responding to ill-founded suspicions of electronic surveillance.

482 F2d at 1026. The prima facie approach employed by the Ninth Circuit fairly balances the important competing considerations at work in electronic surveillance cases. Its stringency makes it appropriate in cases arising in the somewhat more restrictive litigation environment where national security dimensions are present. The DC Circuit's recent use of a prima facie approach in such a case underscores that this is a proper manner in which to proceed. In re Sealed Case,494 F 3d 139. It appears consistent, moreover, with the intent of Congress in enacting FISA's sections 1810 and 1806(f).

B

Defendants devote considerable space to their argument that plaintiffs have not established "Article III standing." E g, Doc #475/49 at 17. In support of this contention, they largely re-

hash and re-purpose the standing arguments made in support of their previous two motions to dismiss.

The court will limit its discussion of this issue to defendants' reliance on Alderman v United States, 394 US 165 (1969), which they cite in all of their briefs on these motions in support of their contention that plaintiffs lack standing. Doc #475/49 at 17; Doc # 499/51 at 9, 10, 26 and 27; Doc #516/54 at 9. In Alderman, the Supreme Court considered, in connection with legal challenges brought under the Fourth Amendment, "the question of standing to object to the Government's use of the fruits of illegal surveillance" in criminal prosecutions. Id at 169. Explaining that "[w]e adhere to * * * the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted," the Court held that the Fourth Amendment protects not only the private conversations of individuals subjected to illegal electronic surveillance, but also the owner of the premises upon which the surveillance occurs. While the Court made mention of the then-recently-enacted **Omnibus Crime Control and Safe Streets Act of 1968 codified at chapter 119 of Title 18 of the United States Code, 18 USC §§ 2510-22** ("Title III"), Alderman did not arise under Title III.

The footnote about standing that defendants repeatedly cite on the instant motions merely amplified the statement in the text of Alderman that "Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose," with the observation that Congress had not provided for such an expansion of standing to suppress illegally intercepted communications in Title III. Id at

175 & n9. Defendants' reliance on Alderman is somewhat baffling because here, the individuals who were allegedly subjected to the warrantless electronic surveillance are parties to the lawsuit and are specifically seeking relief under provisions of FISA intended to provide remedies to individuals subjected to warrantless electronic surveillance. The disposition in Alderman further undermines defendants' broader contention that only acknowledged warrantless surveillance confers standing: the Court remanded the cases to the district court for "a hearing, findings, and conclusions" whether there was electronic surveillance that violated the Fourth Amendment rights of any of the petitioners and, if so, as to the relevance of the surveillance evidence to the criminal conviction at issue. Id at 186.

The court declines to entertain further challenges to plaintiffs' standing; the July 2 order (at 1137) gave plaintiffs the opportunity to "amend their claim to establish that they are 'aggrieved persons' within the meaning of 50 USC § 1801(k)." Plaintiffs have alleged sufficient facts to withstand the government's motion to dismiss. To quote the Ninth Circuit in Alter, "[t]he [plaintiff] does not have to plead and prove his entire case to establish standing and to trigger the government's responsibility to affirm or deny." 482 F2d at 1026. Contrary to defendants' assertions, proof of plaintiffs' claims is not necessary at this stage. The court has determined that the allegations "are sufficiently definite, specific, detailed, and nonconjectural, to enable the court to conclude that a substantial claim is presented." Id at 1025.

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C

Defendants summarize plaintiffs' allegations thusly, asserting that they are "obviously" insufficient "under any standard":

> the sum and substance of plaintiffs' factual allegations are that: (i) the [TSP] targeted communications with individuals reasonably believed to be associated with al Qaeda; (ii) in February 2004, the Government blocked the assets of AHIF-Oregon based on its association with terrorist organizations; (iii) in March and April of 2004, plaintiffs Belew and Ghafoor talked on the phone with an officer of AHIF-Oregon in Saudi Arabia (Mr al-Buthe [sic]) about, inter alia, persons linked to bin-Laden; (iv) in the September 2004 designation of AHIF-Oregon, [OFAC] cited the organization's direct links to bin-Laden as a basis for the designation; (v) the OFAC designation was based in part on classified evidence; and (vi) the FBI stated it had used surveillance in an investigation of the Al-Haramain Islamic Foundation. Plaintiffs specifically allege that interception of their conversations in March and April 2004 formed the basis of the September 2004 designation, and that any such interception was electronic surveillance as defined by the FISA conducted without a warrant under the TSP.

Doc #516/54 at 12 (citations to briefs omitted).

The court does not find fault with defendants' summary but disagrees with defendants' sense of the applicable legal standard. Defendants seem to agree that legislative history and precedents defining "aggrieved person" from the Title III context may be relevant to the FISA context (Doc #475/49 at 17 n 3), but argue that "Congress incorporated Article III standing requirements in any determination as to whether a party is an 'aggrieved person' under the FISA" (Doc #516/54 at 7) and assert that "the relevant case law makes clear that Congress intended that 'aggrieved persons' would be solely those litigants that meet Article III standing requirements to pursue Fourth Amendment claims." Id at 5. Tellingly, defendants in their reply brief consistently refer to

their motion as a "summary judgment motion" and argue that plaintiffs cannot sustain their burden on "summary judgment" based on the allegations of the FAC. Defendants are getting ahead of themselves.

Defendants attack plaintiffs' FAC by asserting that plaintiffs seek to proceed with the lawsuit based on "reasonable inferences" and "logical probabilities" but that they cannot avoid summary judgment because "their evidence does not actually establish that they were subject to the alleged warrantless surveillance that they challenge in this case." Id at 11. At oral argument, moreover, counsel for defendants contended that the only way a litigant can sufficiently establish aggrieved person status at the pleading stage is for the government to have admitted the unlawful surveillance. Transcript of hearing held December 2, 2008, Doc #532 at 5-17.

Without a doubt, plaintiffs have alleged enough to plead "aggrieved person" status so as to proceed to the next step in proceedings under FISA's sections 1806(f) and 1810. While the court is presented with a legal problem almost totally without directly relevant precedents, to find plaintiffs' showing inadequate would effectively render those provisions of FISA without effect, an outcome the court is required to attempt to avoid. See <u>In re National Security Agency</u>, 564 F Supp 2d at 1135 ("While the court must not interpret and apply FISA in way that renders section 1810 superfluous, <u>Dole Food Co v Patrickson</u>, 538 US 468, 476-77, 123 S Ct 1655 (2003), the court must be wary of unwarranted interpretations of FISA that would make section 1810 a more robust remedy than Congress intended it to be.") More

importantly, moreover, plaintiffs' showing is legally sufficient under the analogous principles set forth in Alter and In re Sealed Case.

IV

Because plaintiffs have succeeded in alleging that they are "aggrieved persons" under FISA, their request under § 1806(f) is timely. Section 1806(f), discussed at some length in the court's July 2 order (564 F Supp at 1131), is as follows:

> Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

Plaintiffs propose several approaches for the court to allow plaintiffs to discover information about the legality of the electronic surveillance under § 1806(f):

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> (1) allow plaintiffs to examine a redacted version of the Sealed Document that allows them to see anything indicating whether defendants intercepted plaintiffs' international telecommunications in March and April of 2004 and lacked a warrant to do so;
>
> (2) impose a protective order prohibiting disclosure of any of the Sealed Document's contents;
>
> (3) one or more of plaintiffs' counsel may obtain security clearances prior to examining the Sealed Document (plaintiffs note that precedent exists for this approach, pointing to attorneys at the Center for Constitutional Rights who are involved in Guantanamo Bay detention litigation and attaching the declaration of one such attorney, Shayana Kadidal, describing the process of obtaining Top Secret/Sensitive Compartmented Information ("TS/SCI") clearance for work on those cases (Doc #472-8/46-8)); and
>
> (4) because they have already seen the Sealed Document, plaintiffs' need would be satisfied by the court "simply acknowledging [its] existence and permitting [plaintiffs] to access portions of it and then reference it —— e g, in a sealed memorandum of points and authorities —— in our arguments on subsequent proceedings to determine plaintiffs' standing.

Doc # 472/46 at 27.

In their opposition, defendants do not fully engage with plaintiffs' motion, but rather seem to hold themselves aloof from it:

> [A]side from the fact that plaintiffs have failed to establish their standing to proceed as "aggrieved persons" under the FISA, their motion should also be denied because Section 1806(f) does not apply in this case —— and should not be applied —— for all the reasons previously set forth by the Government. Specifically, the Government holds to its position that Section 1806(f) of the FISA does not preempt the state secrets privilege, but applies solely where the Government has acknowledged the existence of surveillance in proceedings where the lawfulness of evidence being used against someone is at issue.

Doc #499/51 at 24. Defendants have not lodged classified declarations with their opposition as seems to be called for by § 1806(f) upon the filing of a motion or request by an aggrieved

person. Defendants, rather, assert that

> The discretion to invoke Section 1806(f) belongs to the Attorney General, and under the present circumstances —— where there has been no final determination that those procedures apply in this case to overcome the Government's successful assertion of privilege and where serious harm to national security is at stake —— the Attorney General has not done so. Section 1806(f) does not grant the Court jurisdiction to invoke those procedures on its own to decide a claim or grant a moving party access to classified information, and any such proceedings would raise would raise serious constitutional concerns.

Id at 26-27, citing Department of the Navy v Egan, 484 US 518, 529 (1988) for the proposition that "the protection of national security information lies within the discretion of the President under Article II)." Of note, the court specifically rejected this very reading of Egan in its July 2 order. See 564 F Supp 2d at 1121.

Defendants simply continue to insist that § 1806(f) discovery may not be used to litigate the issue of standing; rather, they argue, plaintiffs have failed to establish their "Article III standing" and their case must now be dismissed. But defendants' contention that plaintiffs must prove more than they have in order to avail themselves of section 1806(f) conflicts with the express primary purpose of in camera review under § 1806(f): "to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." § 1806(f).

In reply, plaintiffs call attention to the circular nature of the government's position on their motion:

> Do defendants mean to assert their theory of unfettered presidential power over matters of national security —— the very theory plaintiffs seek to challenge in this case —— as a basis for disregarding this court's FISA preemption ruling and defying the current access proceedings under section 1806(f)? So it seems.

Doc #515/53 at 17. So it seems to the court also.

It appears from defendants' response to plaintiffs' motion that defendants believe they can prevent the court from taking any action under 1806(f) by simply declining to act.

But the statute is more logically susceptible to another, plainer reading: the occurrence of the action by the Attorney General described in the clause beginning with "if" makes mandatory on the district court (as signaled by the verb "shall") the in camera/ex parte review provided for in the rest of the sentence. The non-occurrence of the Attorney General's action does not necessarily stop the process in its tracks as defendants seem to contend. Rather, a more plausible reading is that it leaves the court free to order discovery of the materials or information sought by the "aggrieved person" in whatever manner it deems consistent with section 1806(f)'s text and purpose. Nothing in the statute prohibits the court from exercising its discretion to conduct an in camera/ex parte review following the plaintiff's motion and entering other orders appropriate to advance the litigation if the Attorney General declines to act.

V

For the reasons stated herein, defendants' motion to dismiss or, in the alternative, for summary judgment (Doc #475/49), is DENIED. Plaintiffs' motion pursuant to 50 USC § 1806(f) is GRANTED (Doc #472/46).

The court has carefully considered the logistical problems and process concerns that attend considering classified evidence and issuing rulings based thereon. Measures necessary to

limit the disclosure of classified or other secret evidence must in some manner restrict the participation of parties who do not control the secret evidence and of the press and the public at large. The court's next steps will prioritize two interests: protecting classified evidence from disclosure and enabling plaintiffs to prosecute their action. Unfortunately, the important interests of the press and the public in this case cannot be given equal priority without compromising the other interests.

To be more specific, the court will review the Sealed Document ex parte and in camera. The court will then issue an order regarding whether plaintiffs may proceed —— that is, whether the Sealed Document establishes that plaintiffs were subject to electronic surveillance not authorized by FISA. As the court understands its obligation with regard to classified materials, only by placing and maintaining some or all of its future orders in this case under seal may the court avoid indirectly disclosing some aspect of the Sealed Document's contents. Unless counsel for plaintiffs are granted access to the court's rulings and, possibly, to at least some of defendants' classified filings, however, the entire remaining course of this litigation will be ex parte. This outcome would deprive plaintiffs of due process to an extent inconsistent with Congress's purpose in enacting FISA's sections 1806(f) and 1810. Accordingly, this order provides for members of plaintiffs' litigation team to obtain the security clearances necessary to be able to litigate the case, including, but not limited to, reading and responding to the court's future orders.

Given the difficulties attendant to the use of classified material in litigation, it is timely at this juncture for

defendants to review their classified submissions to date in this litigation and to determine whether the Sealed Document and/or any of defendants' classified submissions may now be declassified. Accordingly, the court now directs defendants to undertake such a review.

The next steps in this case will be as follows:

1. Within fourteen (14) days of the date of this order, defendants shall arrange for the court security officer/security specialist assigned to this case in the Litigation Security Section of the United States Department of Justice to make the Sealed Document available for the court's in camera review. If the Sealed Document has been included in any previous classified filing in this matter, defendants shall so indicate in a letter to the court.

2. Defendants shall arrange for Jon B Eisenberg, lead attorney for plaintiffs herein and up to two additional members of plaintiffs' litigation team to apply for TS/SCI clearance and shall expedite the processing of such clearances so as to complete them no later than Friday, February 13, 2009. Defendants shall authorize the court security officer/security specialist referred to in paragraph 1 to keep the court apprised of the status of these clearances. Failure to comply fully and in good faith with the requirements of this paragraph will result in an order to show cause re: sanctions.

3. Defendants shall review the Sealed Document and their classified submissions to date in this litigation and determine whether the Sealed Document and/or any of defendants' classified submissions may be declassified, take all necessary steps to declassify those that they have determined may be declassified and,

no later than forty-five (45) days from the date of this order, serve and file a report of the outcome of that review.

4. The parties shall appear for a further case management conference on a date to be determined by the deputy clerk within the month of January 2009. Counsel should be prepared to discuss adjudication of any and all issues that may be conducted without resort to classified information, as well as those issues that may require such information. Counsel shall, after conferring, submit brief statements of their respective plans or a joint plan, if they agree to one.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge